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No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SCOTT J. CHATTIN,
Cryptologic Technician (Collection) Seaman,
United States Navy,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Military Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the United States Constitution's Appointments Clause preclude Congress from granting the Judge Advocate General of the Navy the power to appoint military trial judges?

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UNITED STATES OF AMERICA,
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Petition for a Writ of Certiorari to the United States Court of Military Appeals

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Scott J. Chattin, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals rendered in this proceeding on September 14, 1992.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Chattin*, —— M.J. ——, No. 67186/NA (C.M.A. Sept. 14, 1992) (summary disposition), is reprinted as Appendix A.

The opinion of the United States Navy-Marine Corps Court of Military Review, *United States v. Chattin*, 33 M.J. 802 (N.M.C.M.R. 1991), is reprinted as Appendix B.

JURISDICTION

The United States Court of Military Appeals affirmed the decision of the United States Navy-Marine Corps Court of Military Review on September 14, 1992. 28 U.S.C.A. § 1259(3) (West Supp. 1992) provides jurisdiction in this case and entitles petitioner to seek review of the United States Court of Military Appeals' decision.

CONSTITUTIONAL PROVISION, STATUTE, REGULATION, AND MEMORANDUM INVOLVED

The pertinent portion of Art. II, § 2 is set forth in Appendix C. The text of 10 U.S.C. § 826 is set forth in Appendix D. The text of Rule for Courts-Martial 801 is set forth in Appendix E. The text of Memorandum from the Deputy Secretary of Defense to the Secretaries of the Military Departments and General Counsel of the Department of Defense (March 3, 1992), is set forth in Appendix F.

STATEMENT OF THE CASE

At a general court-martial, petitioner pled guilty to and was found guilty of one count of violating a lawful general order and two counts of violating the Federal Espionage Act in violation of 10 U.S.C. §§ 892 and 934, and 18 U.S.C. §§ 793(e) and 793(f).[1] The trial judge sentenced petitioner to confinement for four years, forfeiture of all pay and allowances, reduction to the lowest enlisted rank, and to be separated from the Navy with a bad-conduct discharge. As a result of a plea bargain, the Commander,

[1] Article 134 of the Uniform Code of Military Justice allows service members to be tried by courts-martial for violating any non-capital federal criminal statute. 10 U.S.C. § 934 (1988).

Naval Air Force, U.S. Atlantic Fleet, suspended the execution of confinement in excess of three years. On appeal, the Navy-Marine Corps Court of Military Review set aside one of the Federal Espionage Act convictions, but affirmed the remaining convictions and the sentence. *United States v. Chattin*, 33 M.J. 802, 805 (N.M.C.M.R. 1991). The Court of Military Appeals exercised its discretionary jurisdiction to consider a challenge to petitioner's remaining 18 U.S.C. § 793 conviction. Relying on the contemporaneously-decided case of *United States v. McGuinness*, 35 M.J. 149 (C.M.A. 1992), the Court of Military Appeals summarily affirmed the Navy-Marine Corps Court's decision. *United States v. Chattin*, —— M.J. ——, No. 67186/NA (C.M.A. Sept. 14, 1992) (summary disposition).

REASON FOR GRANTING THE WRIT

CONGRESS' PLACEMENT OF THE POWER TO APPOINT MILITARY TRIAL JUDGES IN THE JUDGE ADVOCATES GENERAL IS A STRUCTURAL CONSTITUTIONAL DEFECT IN THE MILITARY JUSTICE SYSTEM WHICH DEMANDS IMMEDIATE ATTENTION.

Each year, thousands of service members are tried by courts-martial. In Fiscal Year 1991, for example, there were 2,610 general courts-martial and 5,538 special courts-martial.[2] Annual Report on Military Justice, 34 M.J. LVII, CV, CXIX, CXXXII, CXLII (1991). The judges who preside over general courts-martial are, for all practical purposes, the equivalent of United States District Court judges presiding over felony trials. A gen-

[2] General courts-martial can impose any authorized sentence including, in some cases, death. 10 U.S.C. § 818 (1988). Special courts-martial, on the other hand, may impose no more than six months' confinement. 10 U.S.C. § 819 (1988). Special courts-martial can, however, sentence service members to be separated with a bad-conduct discharge. *Id.*

eral court-martial judge has far-ranging powers, including the power to "rule on all interlocutory questions and all questions of law raised during the court-martial," to "[i]nstruct the members on questions of law and procedure which may arise," to "promulgate and enforce rules of court," and to "exercise contempt power."[3] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 801(a)-(b). In a case such as this, where the accused chooses a bench trial, a court-martial judge has even more discretion than a federal district court judge because the court-martial judge is not constrained by the Federal Sentencing Guidelines. *See United States v. Brown*, 28 M.J. 470, 474 n.3 (C.M.A. 1989). The trial judge in this case could have imposed any sentence ranging from no punishment to confinement for 10 years. Record at 61; *see generally* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1002.[4]

The Appointments Clause precludes Congress from placing the power to appoint inferior officers in anyone other than the President alone, the Courts of Law, or the Heads of Departments. U.S. Const. Art. II, § 2, cl. 2. Congress can devolve appointment authority upon no other official. *Freytag v. Commissioner of Internal Revenue*, 111 S. Ct. 2631, 2642 (1991). There can be little doubt that military trial judges, who exercise extraordinary authority and discretion, are Officers of the United States. *See Buckley v. Valeo*, 424 U.S. 1, 126 (1976)

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[3] "A court-martial, provost court, or military commission may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder. The punishment may not exceed confinement for 30 days or a fine of $100, or both." 10 U.S.C. § 848 (1988).

[4] "Subject to limitations in this Manual, the sentence to be adjudged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed by the code, a court-martial may adjudge any punishment authorized by this Manual, including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment."

(per curiam). Yet Congress vested the power to appoint military trial judges in the Judge Advocates General. 10 U.S.C. § 826. Placing the power to appoint judges in such low-level officials[5] raises a serious question under the Appointments Clause.

As in *Freytag*, "[i]t is beyond question . . . that Congress did not intend to grant to the President the power" to appoint military trial judges. 111 S. Ct. at 2642. Nor is the Judge Advocate General of the Navy, who is a subordinate of the Secretary of the Navy, 10 U.S.C.A. § 5148 (West Supp. 1992), a Head of a Department. It is self-evident that the Judge Advocate General of the Navy, who is by statute an Executive Branch officer tasked with performing legal duties "under the direction of the Secretary of the Navy," *id.* at § 5148(b), (d), is not a "Court of Law." Thus, Congress gave the power to appoint military trial judges to an impermissible official.

The Appointments Clause preserves "the Constitution's structural integrity by preventing the diffusion of the appointment power." *Freytag*, 111 S. Ct. at 2638. This concern is directly implicated by allowing the Judge Advocates General to appoint military trial judges. As the Court reasoned in *Freytag*:

> The Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint. Because it articulates a limiting principle, the Appointments

[5] The Judge Advocates General are not even the primary legal advisors in their respective services. Rather, "The General Counsels of the Military Departments shall be the chief legal officers of their respective departments, responsible to and subject to the authorities of the Secretaries of the Military Departments as the heads of the Military Departments and the General Counsel of the Department of Defense as the chief legal officer of the Department of Defense." Memorandum from the Deputy Secretary of Defense to the Secretaries of the Military Departments and General Counsel of the Department of Defense (March 3, 1992) [Appendix F].

> Clause does not always serve the Executive's interests. *For example, the Clause forbids Congress from granting the appointment power to inappropriate members of the Executive Branch.* Neither Congress nor the Executive can agree to waive this structural protection. . . . The structural interests protected by the Appointments Clause are not those of any one Branch of government but of the entire Republic.

Freytag, 111 S. Ct. at 2639 (emphasis added).

The significance of the Appointments Clause defect is magnified by the fact that military trial judges serve without the protection of a fixed term of office. *See generally United States v. Graf*, 35 M.J. 450 (C.M.A. 1992). Thus, not only are military trial judges *appointed* by the Judge Advocate General, they serve at the pleasure of the Judge Advocate General, who may *remove* them from office. Giving such a low-level official the power of appointment and removal carries the risk that these powers will be used to advance the Judge Advocate General's parochial interests.

The appointment of military trial judges in violation of the Appointments Clause is a serious constitutional defect which the Court should address immediately. In *Freytag*, the Court indicated that "[t]he alleged defect in the appointment of the special trial judge goes to the validity of the Tax Court proceeding that is the basis for this litigation." 111 S. Ct. at 2639. This comports with the Court's earlier recognition that individuals appointed in violation of the Appointments Clause may not be involved in "the administration and enforcement of the public law[.]" *Buckley v. Valeo*, 424 U.S. at 139. Thus, until Congress places the power to appoint military trial judges in a constitutionally permissible official, every court-martial is invalid.

Two of the Courts of Military Review have recently addressed whether the Judge Advocates General may constitutionally appoint military judges. For different rea-

sons, both the Coast Guard and Navy-Marine Corps Courts of Military Review affirmed the practice. *United States v. Prive*, 35 M.J. 569 (C.G.C.M.R. 1992); *United States v. Coffman*, 35 M.J. 591 (N.M.C.M.R. 1992) (per curiam). Neither court's reasoning, however, can withstand scrutiny.

In *United States v. Prive*, 35 M.J. 569 (C.G.C.M.R. 1992), the Coast Guard Court of Military Review expressly held that general court-martial judges are officers, not mere employees, of the United States. 35 M.J. at 572-73. The Coast Guard Court, however, held that Congress is not bound by the Appointments Clause when exercising its Article I, Section 8, Clause 14 powers to regulate the land and naval forces. 35 M.J. at 576-77. This holding is inconsistent with this Court's command that "[u]nless their selection is elsewhere provided for, all officers of the United States are to be appointed in accordance with the [Appointments] Clause. . . . No class or type of officer is excluded because of its special functions." *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam). Thus, *Prive* was wrongly decided.

In *United States v. Coffman*, 35 M.J. 591 (N.M.C.M.R. 1992) (per curiam), the Navy-Marine Corps Court of Military Review held that the method by which military trial judges are appointed satisfies the Appointments Clause because all of those judges had earlier been appointed and confirmed as military officers. 35 M.J. at 592. This argument, however, misses the whole point of the Appointments Clause. While the trial judge in this case was appointed by the President *as a military officer*, he was not appointed by the President *as a judge*. Judge Rapp had the authority to sentence petitioner *not* because Judge Rapp was a Navy captain, but because he was filling the office of general court-martial judge. The *independent* judicial authority which Judge Rapp and other military trial judges wield is quite different from

the structured, accountable authority which other military officers exercise.

Coffman relied in part on *Shoemaker v. United States*, 147 U.S. 282 (1893). 35 M.J. at 592. This reliance, however, is misplaced. Judge Lamberth emphasizes, "[T]he provision challenged in *Shoemaker* added certain duties to two *offices*; it did not confer additional responsibilities on any particular *officer*." *Olympic Fed. Sav. & Loan Ass'n v. Director, Office of Thrift Supervision*, 732 F. Supp. 1183, 1192 (D.D.C. 1990). *Shoemaker* is entirely irrelevant to the question of how military trial judges are appointed because Congress did not provide that service as a judge is an additional duty of a designated *office*. A general court-martial judgeship is not an appurtenance of some other position. Rather, it is an office unto itself. Unlike the two military officers at issue in *Shoemaker*, military trial judges do not serve *ex officio*. Thus, *Shoemaker* does not resolve the Appointments Clause issue.

Although this issue was not raised below, the Court should not treat it as waived or forfeited. *See Freytag*, 111 S. Ct. at 2647 n.2 (Scalia, J., concurring). As noted in *Freytag*, the Court "has exercised its discretion to consider nonjurisdictional claims that have not been raised below." 111 S. Ct. at 2639 (citing, *inter alia*, *Glidden Co. v. Zdanok*, 370 U.S. 530, 535-36 (1962)). The Court emphasized, "*Glidden* expressly included Appointments Clause objections to judicial officers in the category of nonjurisdictional structural constitutional objections that could be considered on appeal whether or not they were ruled upon below." *Freytag*, 111 S. Ct. at 2639. Due to this issue's importance to the military justice system and to the rule of Constitutional law, the Court should hear the Appointments Clause issue.

Finally, this Court has jurisdiction to resolve the Appointments Clause question even though the Court of

Military Appeals did not grant review on this issue. The Military Justice Act of 1983, which established this Court's certiorari jurisdiction over Court of Military Appeals decisions, limited this Court's certiorari jurisdiction to cases in which the Court of Military Appeals exercised mandatory jurisdiction, cases in which the Court of Military Appeals granted review of a case, and other cases in which the Court of Military Appeals granted relief. Military Justice Act of 1983, § 10(a)(1), 97 Stat. 1405, 1406 (1983) (codified at 28 U.S.C.A. § 1259 (West Supp. 1992)); *see also* 10 U.S.C.A. § 867a (West Supp. 1992). The Military Justice Act of 1983's legislative history indicates, "In view of current concerns about the Supreme Court's docket, the legislation has been drafted in a manner that will limit the number of cases subject to direct Court review." H.R. Rep. No. 549, 98th Cong., 1st Sess. 16-17 (1983). The number of cases subject to review is the same regardless of whether this Court's certiorari jurisdiction is limited to issues actually considered by the Court of Military Appeals. Thus, the limitation's purpose was not to insulate certain issues from review by this Court, but rather to prevent an intolerable increase in this Court's workload. This Court may, in the exercise of its judicial discretion, review any issue in a case which meets 28 U.S.C. § 1259's requirements.

CONCLUSION

The manner in which military trial judges are appointed presents a serious constitutional issue: may Congress vest the power to appoint Article I court judges in an official who is statutorily subordinate to the Secretary of a Department? The judges who are now selected by the Judge Advocates General preside over thousands of courts-martial every year. These judges, who wield awesome authority over the defendants who come before them, should be selected in conformance with the Appoint-

ments Clause. Accordingly, the Court should issue a writ of certiorari.

Respectfully submitted,

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December 14, 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 67186/NA
CMR Dkt. No. 89-2734

UNITED STATES,
Appellee

v.

SCOTT J. CHATTIN (208-60-8825),
Appellant

ORDER

Upon consideration of the granted issue in light of *United States v. McGuinness*, No. 67,241, —— MJ —— (CMA Sept. 14th, 1992), it is by the Court this 14th day of September 1992

ORDERED:

That the deicsion of the United States Navy-Marine Corps Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

APPENDIX B

U.S. NAVY-MARINE CORPS COURT OF MILITARY REVIEW

NMCM 89 2734

UNITED STATES

v.

SCOTT J. CHATTIN, 208 60 8825, Cryptologic Technician (Collection) Seaman (E-3), U.S. Navy

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Sentence Adjudged 24 April 1989

Decided 9 July 1991

LT Jacob R. Walker, JAGC, USNR, Appellate Defense Counsel.

LT Kirk A. Ludwig, JAGC, USNR, Appellate Government Counsel.

LCDR J. Richard Chema, JAGC, USN, Appellate Government Counsel.

Before ALBERTSON, LANDEN and LAWRENCE, JJ.

ALBERTSON, Senior Judge:

By exceptions and substitutions and in accordance with his pleas, appellant was found guilty of violating Articles 92 and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 934. Appellant was found guilty of one specification alleging violation of a lawful general regu-

lation Chief of Naval Operations Instruction (OPNAVINST) 5510.1H: Department of the Navy Information and Personnel Security Program) (OPNAV) by failing to safeguard classified materials in his possession and two specifications alleging espionage under 18 U.S.C. §§ 793(e) and (f)(1) (hereinafter "section 793(e)" and "section 793(f)(1)") by removing a classified document from its proper location and willfully retaining it. After his pleas of guilty were accepted to these specifications, the military judge merged the specifications into one offense for sentencing purposes. Appellant was sentenced to confinement for 4 years, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. The convening authority approved the sentence as adjudged, but suspended all confinement in excess of 3 years for 12 months.

I. PREEMPTION

Appellant argues that prosecution under Article 134, UCMJ, for violating section 793(e)[1] for unauthorized retention of a classified document was preempted by his guilty pleas to the Article 92, UCMJ, offense of violating the OPNAV instruction. We find no merit to his argument.

Appellant had authority to possess the classified document in the performance of his duties, but his possession became unauthorized when he took that classified document out of secure spaces to his home. In so doing, appellant violated both the provisions of the OPNAV instruction prohibiting removal of classified documents from secure spaces, contrary to his required duties, and

[1] In pertinent part, 18 U.S.C. § 793(e) reads: "Whoeevr having unauthorized possession of, access to, or control over any document or information . . . relating to the national defense . . . willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it: . . . Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

section 793(e) by becoming an unauthorized possessor of the classified information when he removed it from its secure place without authority, willfully retained it, and failed to return it to the proper custodians. Appellant's violation of section 793(e) persisted until, days later, the document was recovered and returned to proper custody.

None of the specific punitive articles in the UCMJ cover the duty to protect classified information and return it to the proper authorities when one has unauthorized possession of classified information. 18 U.S.C. § 793(e) makes criminal precisely the conduct engaged in by appellant, and is properly applicable to the appellant under the provisions of the UCMJ. Article 134, clause 3; Para. 60c(4)(b), Manual for Courts-Martial, United States, 1984. Congress did not intend that orders of both general and local applicability issued by commanders and enforceable against military members would preempt a federal criminal statute (18 U.S.C. § 793(e)) which is specifically enforceable under clause 3 of Article 134, UCMJ. The inadvertent condemnation in a general regulation of conduct that violates a section of the Federal penal code would effectively limit the punishment for such criminal conduct to a maximum of a dishonorable discharge and 2 years of confinement, thereby frustrating the intent of Congress in establishing clause 3 of Article 134, UCMJ. We find nothing in the material cited by appellant that supports the proposition he maintains. In short, general orders cannot and do not preempt offenses that Congress made applicable to the military through Article 134. *See United States v. Wright*, 5 M.J. 106 (C.M.A.1978).

II. PROVIDENCE INQUIRY

The providence inquiry regarding the appellant's plea of guilty to Specification 2 of Charge IV reveals that appellant, a lawful possessor or one entrusted with the possession, knowingly removed a classified document from

its secure spaces and took it to his home without proper authorization. The facts elicited show that when he removed the document from the secure spaces he became an unauthorized possessor because he took the document beyond the scope of his lawful and authorized possession. At no time after he left the proper place of custody with the document in his possession did appellant have authorized possession of or was he entrusted with the document. Since the facts show appellant was an unauthorized possessor of the document, there is no factual basis to support the first element of section 793(f)(1) which requires the offender to be a lawful possessor or one who has been entrusted with the document.

Additionally, the providence inquiry fails to reveal a sufficient legal basis to support the finding of guilty to Specification 2, Charge IV. The statutory language of section 793(f)(1) contains the term "permit" as the active ingredient for the gross negligence condemned.[2] The statute, however, does not define "permit." When the staute does not define the term it uses, absent indications to the contrary, the term is ordinarily interpreted according to its general usage or common meaning. *See United States v. Gonzalez*, 16 M.J. 428, 429 (C.M.A. 1983) (citing *Burns v. Alcala*, 420 U.S. 575, 580-81, 95 S.Ct. 1180, 1184-85, 43 L.Ed.2d 469 (1975)). "Permit" means "[t]o suffer, allow, consent, let; to give leave or license; to acquiesce by failure to prevent, or to expressly assent or agree to the doing of an act." *Black's Law Dictionary* 1026 (5th ed. 1979). This definition implies

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[2] In pertinent part, 18 U.S.C. § 793(f)(1) reads:

> Whoever, being entrusted with or having lawful possession or control of any document or information . . . relating to the national defense, (1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, or stolen, abstracted, or destroyed. . . .
>
> Shall be fined not more than $10,000 or imprisoned not more than 10 years, or both.

that before one entrusted with or in lawful possession of a document is criminally liable for his conduct under the removal portion of section 793(f)(1), a third party must be the remover of the document. Although the statutory language of section 793(f)(1) should be given broad interpretation, *United States v. Gonzalez*, 12 M.J. 747, 751 n. 6 (A.F.C.M.R. 1981), *aff'd*, 16 M.J. 428 (C.M.A. 1983), such an interpretation must be logical and consistent with the conduct Congress intended the statue to prohibit. *See Moskal v. United States*, —— U.S. ——, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990); S.R.Rep. 2369, 81st Cong.2d Sess. (1950); H.R.Rep. 647, 81st Cong. 1st Sess. (1949); U.S. Code Cong. Serv., p. 3886. In light of our reading of the statute as a whole and its legislative history, we do not find it logical that the Congress intended as the target of its prohibition under this subsection the individual who "permits" himself because of his gross negligence to remove a document entrusted to him, or in his lawful possession, from its proper place of custody. We believe this interpretation is supported in particular by comparing the language of section 793(e) with section 793(f)(1). The former provision uses verbs that contemplate direct active participation in the unauthorized handling of the document by the individual entrusted with or in lawful possession of the document. The latter uses verbs indicating a passive participation in the handling of the document by the same individual allowing a third party as the remover to become an unauthorized illegal possessor of the document. At no time did appellant because of his gross negligence permit another party to remove the classified document from its proper place of custody; rather, he stuffed the document down his pants front and walked out of the building with it; he deliberately, intentionally and without authorization took the documents beyond the scope of his lawful possession and entrustment. Appellant was in unauthorized possession of the document. We hold, therefore, that the conduct prohibited by 18 U.S.C. § 793(f)(1) pre-

supposes compromise of the classified [3] material through gross negligence by one who has authorized possession of, or has been entrusted with, the material *permitting* it to be removed from its proper place of custody by a third party.

Accordingly, the facts elicited by the military judge do not support the appellant's plea of guilty to Specification 2, Charge IV, and the legal sufficiency of the providence inquiry is also deficient in light of our interpretation that a third party was the perpetrator that the removal portion of the provision alleged is meant to hold criminally liable. *See Gonzalez* (wherein the accused inadvertently removed but by his subsequent gross negligence lost the document entrusted to him). Section 793(e) rather than section 793(f)(1) prohibits appellant's conduct. The finding of guilty to Specification 2 of Charge IV is set aside and Specification 2 is dismissed.

III. MULTIPLICITY

Assuming arguendo that we are incorrect in our interpretation of section 793(f)(1) such that appellant's conviction is sustainable, we find the course of conduct for which appellant was convicted under section 793(e) is the same course of conduct for which he was convicted under section 793(f)(1) and therefore the offenses are multiplicious for findings purposes. As such we would dismiss the findings as to Specification 2 under Charge IV.

Appellant's failure to protect the classified document in violation of the OP-NAV instruction and his unauthorized possession and willful failure to return the docu-

[3] The information or document may, but need not, be of the type requiring classification under the security criteria within the Department of the Navy. *See United States v. Harris*, 30 C.M.R. 588 (A.B.R. 1967), *aff'd*, 18 U.S.C.M.A. 596, 40 C.M.R. 308 (1969) (citing only *Gorin v. United States*, 312 U.S. 19, 61 S.Ct. 429, 85 L.Ed. 488, *reh. denied*, 312 U.S. 713, 61 S.Ct. 618, 85 L.Ed. 1144 (1941)).

ment to an officer or employee of the U.S. Government entitled to receive it, as alleged in the Specification under Charge I and Specification 1 of Charge IV, respectively, were related as a part of a single course of conduct. These offenses were not multiplicious or unreasonably duplicative for purposes of findings because the offense did not stand in the relationship of greater and lesser offenses, the facts were not part of an indivisible crime, and the facts do not reflect a continuous course of conduct prohibited by one statutory provision. *United States v. Baker*, 14 M.J. 361, 366 (C.M.A. 1983). We agree with the military judge, however, that these offenses are multiplicious for purposes of sentencing.

The remaining assignments of error are without merit. *See United States v. Allen*, 31 M.J. 572 (N.M.C.M.R. 1990); Article 66(c), UCMJ, 10 U.S.C. § 866(c). The findings, as modified above, and the sentence, as approved on review below, are affirmed.

Judge LANDEN concurs.

LAWRENCE, Judge (concurring in part/dissenting in part):

I concur in holding that a prosecution under clause 3 of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934, is not barred because the same conduct may be prosecuted as a violation of a regulation or order under Article 92, UCMJ, 10 U.S.C. § 892. To accept such a proposition would not only frustrate congressional intent in including clause 3 in Article 134 but would severely restrict military commanders in regulating conduct that is similar to that proscribed by Federal penal statutes. This case perfectly illustrates the point. Federal penal statutes do not prohibit every act that is detrimental to national security or that involves the mishandling of classified or otherwise sensitive materials. Those statutes do not purport to regulate the details of the day-to-day use, handling, and custody of

documents and other materials that are central to intelligence activities by civilian or military agencies. Appellant would have us hold that because Congress has proscribed certain conduct that logic and history have shown to be inimical to our national security the Chief of Naval Operations cannot promulgate and punitively enforce necessary and appropriate regulations to control the use and handling of classified or otherwise sensitive information without rendering portions of section 793 inapplicable to members of the United States Navy. This contention flies in the face of the law, common sense, and obvious military necessity.

Regarding the interpretation of section 793(e), this section concerns only persons whose possession of, access to, or control over any enumerated matter is "unauthorized." Subsection (e) does not indicate whether authorized persons who act beyond the scope of their authorization lose their authorized status such that they may be prosecuted under this subsection, or whether persons whose initial possession of, access to, or control over any enumerated matter was legal may only be prosecuted under section 793(d). If the language of the subsection is correctly interpreted to pertain only to those persons whose initial possession of, access to, or control over the matter was unauthorized, appellant's conduct would not fall under this subsection.

The choice of the word "unauthorized" was intended to "preclude the necessity for proof of illegal possession" and was a change from the language of former section 793 that used the terms "lawfully or unlawfully." H.R. Rep. No. 647, 81st Cong., 1st Sess. 4 (1949). Within the context of a criminal proscription, the least disputable ordinary meaning of the term "unauthorized" is that which is contrary to law or regulation. There is another meaning, however, that is used appropriately when conduct or a status ordinarily occurs or exists only if it is permitted or directed by some higher authority. Certain information that is critical to national security is closely

controlled and only a limited number of persons who require the information to properly perform their duties may possess, have access to, or have control over it. The enumerated items and information listed in section 793 are especially protected. Even for government employees, access to such information is the exception, not the rule. Authorization for access to such information must be affirmatively permitted or directed by some competent authority; therefore, I conclude that within the context of section 793 unauthorized possession is also that which is not affirmatively permitted or directed by a competent authority. Under this interpretation, a person who comes into possession of such an item or information who lacks any legal or regulatory authority to possess, have access to, or have control over it may be prosecuted under section 793(e) as well as a person who is initially affirmatively authorized those rights but who violates the terms of that authorization. *Cf. United States v. Morison*, 844 F.2d 1057 (4th Cir.), *cert. denied*, 488 U.S. 908, 109 S.Ct. 259, 102 L.Ed.2d 247 (1988). This conclusion results in an admittedly broad interpretation of the term.

Assuming arguendo an ambiguity in the meaning of this term sufficient to justify resort to legislative history or motivating policy behind the legislation, *see Moskal v. United States*, —— U.S. ——, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990), the sparse legislative history but clear motivating policy behind these amendments support this broad interpretation. The amendments were drafted by an interdepartmental intelligence committee whose members were aware of regulations and orders in civilian agencies and military departments that controlled access to and handling of classified or otherwise sensitive materials. Senator McCarran, the sponsor of the amendments, explained that section 793(e) was to close one of two "glaring loopholes" that ostensibly were in existing legislation. The subsection was "to prevent such a ludicrous circumstance as arose in the famous Chambers pumpkin papers, wherein a man could have unauthorized use of certain

defense and security information and yet not be committing an unlawful act when he neglects to deliver the information up to proper authorities." Cong.Rec. 14177 (Sept. 5, 1950). Senator McCarran went on to point out that former section 793(d) required that appropriate authorities make a demand on the unauthorized possessor and until the demand was refused no crime had taken place.

> The inadequacy of this provision is self-evident, since by the very nature of things an unauthorized possessor would most likely not be known to those entitled to receive the restricted enumerated items. The most famous example of this situation is, of course, the Chambers pumpkin papers. Chambers had in his possession—that is in his unauthorized possession—certain restricted or classified items which related to national defense. Yet, his possession of such items was not a crime. He could not be charged with a crime in respect to his possession of the pumpkin papers until a person entitled to receive those items made a demand upon him for their delivery, and then only if he refused the demand.
>
> This situation is corrected by the subsection lettered 'e' . . . which provides that those who have unauthorized possession of any of the enumerated items in the existing law relating to the national defense must surrender possession thereof to the proper authorities regardless of a demand therefor.

Id. at 14178 (emphasis added).

In 1948, Whittaker Chambers appeared for a second time before a subcommittee of Congress and produced copies of numerous documents, most of which came from the State Department, that he said he received years before from Alger Hiss, Harry Dexter White, and other persons. Due to their place of storage by Chambers, they became known as the "pumpkin papers." *See, e.g.*, H.R.

Rep. No. 1229, 82d Cong., 2d Sess. 56-58 (1952). Unlike Hiss or White, who when the documents were passed were government employees, Chambers apparently at no time had any authorized possession of, access to, or control over them. He was a private citizen who came into possession of these sensitive items from persons whose delivery of them was undoubtedly contrary to law and regulation, and the fact that Chambers could not be prosecuted for his lengthy undisclosed retention of them angered and upset many Americans in and out of Congress.

Additional support for the contention that section 793 (e) embraces the conduct of those whose initial possession is unauthorized as well as those whose initial possession is authorized is found in the House report concerning these changes that pointed to "serious gaps in our present laws [that] permit people, both citizens and aliens alike, opportunities to acquire information vital to our national security and to use that information to the disadvantage and danger of the United States without fear of prosecution in our courts." H.R.Rep. No. 647, 81st Cong., 1st Sess. 2 (1949). The reference to "both citizens and aliens alike" strongly suggests a broad intended scope to section 793(e) to reach not only those authorized possessors who violate the terms of their authorization but also persons such as aliens, whose possession of any enumerated item or information is rarely permitted, much less directed, by competent authority, who, like Chambers, might receive documents from an Alger Hiss or Harry Dexter White and willfully retain them for nefarious purposes.

In general, the legislative history shows that Congress intended to place an affirmative duty on both lawful and unauthorized possessors to report any condition that has resulted or might result in actual or potential compromise of enumerated items or national defense information. One means for doing so was drafting section 793

(e) to omit a demand requirement. *See, e.g.*, H.R.Conf. Rep. No. 3112, 81st Cong., 2d Sess. (1950).[1] As noted by Senator McCarran, the government has no opportunity to make a demand to return an item in a situation such as the Chambers case since it is unaware of the unauthorized possession. Likewise, the government often cannot make a prompt demand in the case of an authorized person who surreptitiously violates the terms of his authorization by improperly removing or copying an enumerated item since the government may be unaware of the removal or copying. An important facet of the Chambers case was the unauthorized removal or copying and willful retention by government employees of sensitive information that went undiscovered for many years.

Given the clear motivating policy behind these amendments to protect national defense information from any kind of compromise and to make prosecution of government employees as well as private citizens whose conduct threatens national security more practicable, it is reasonable to conclude that Congress in section 793(e) intended the broad interpretation of the term "unauthorized" that is enunciated herein. The least disputable ordinary meaning of the term "unauthorized" in penal statutes, which is sufficiently obvious and accepted to foreclose reference to legislative history or motivating policy behind the legislation, is thus expanded by the legislative history and motivating policies behind the legislation to include also the wider meaning of that which is not affirmatively permitted or directed by competent authority. Since there is no resulting substantial doubt regarding the section's intended scope, the rule of lenity is irrelevant to interpretation of the statute and this case.

---

[1] Another was requiring in section 793(f)(2) lawful possessors to report security violations of which they are aware.

The evidence establishes that appellant exceeded the scope of his authorized possession of and control over these documents in taking them from their place of custody to his home. This removal was prohibited by military law and regulation and therefore falls within the broad meaning of the term unauthorized as it is used in this statute. After having removed these documents from their proper place, appellant willfully retained them in his home for several days. He did not deliver them to a person entitled to receive them during this period of retention and only their inadvertent discovery by another person who was unauthorized to possess, have access to, or have control over the documents brought them to the attention of proper authority. I conclude, therefore, that appellant's conviction of violating section 793(e) is fully supported by the evidence.

I dissent from the majority's dismissal of appellant's conviction of violating section 793(f)(1). Certainly, the conviction may not be based on appellant's own removal of the documents rather than removal by another person as the subsection clearly requires. Appellant's negligence did, however, result in the loss of national defense information when another sailor inadvertently discovered the documents in appellant's home a couple days after appellant had removed them. This discovery by one who had no apparent authorization to possess, have access to, or have control over them constitutes a "loss," within the broad scope of section 793(f)(1), of the information contained within them. *Cf. United States v. Gonzalez*, 16 M.J. 428 (C.M.A.1983). Since such loss is prohibited in the same subsection of section 793(f) as the removal of which appellant was convicted in accordance with his pleas and the maximum authorized punishment is therefore the same as for the removal, the loss is a closely-related offense. If an accused pleads guilty and during the providence inquiry his responses establish a different but closely-related offense having a similar maximum punishment, the guilty plea may be affirmed

on review. *United States v. Hubbard*, 28 M.J. 203, 206 (C.M.A.1989); *United States v. Epps*, 25 M.J. 319, 323 (CM.A.1987); *United States v. Felty*, 12 M.J. 438 (C.M.A. 1982). I would affirm appellant's conviction of violating section 793(f)(1) on this basis.

In coming to this conclusion, I dissent from the majority's contention that prosecution under section 793 (f)(1) is precluded of a person who, being entrusted with an enumerated item or information relating to the national defense, in some way violates the terms of his entrustment: violation of the terms of this kind of entrustment does not terminate the entrustment. The terms of any entrustment of national defense information necessarily include a requirement of due "care, use or disposal of it," *see Black's Law Dictionary* 478 (5th ed. 1979); thus, if the majority's interpretation were accepted, many, if not all, acts of gross negligence that constituted a violation of section 793(f)(1) would terminate the entrustment and preclude prosecution under the section.

Additionally, section 793(f) applies to *lawful* possessors or those in lawful control, not *authorized* possessors or controllers. It is entirely logical that a military member may not be prosecuted under section 793(f)(1) because his unauthorized possession or control is unlawful as a violation of Article 92, although a civilian may be prosecuted because his unauthorized possession or control is not a violation of a Federal penal statute. I cannot conclude that Congress intended an interpretation of the phrase "being entrusted with" or "having lawfully possession or control" in section 793 that would render the section ineffective to punish the conduct against which it is obviously directed.

APPENDIX C

U.S. Const. art. II, § 2

> The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

APPENDIX D

10 U.S.C. § 826. Uniform Code of Military Justice art. 26.

§ 826. Art 26. Military judge of a general or special court-martial

(a) A military judge shall be detailed to each general court-martial. Subject to regulations of the Secretary concerned, a military judge may be detailed to any special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial. The military judge shall preside over each open session of the court-martial to which he has been detailed.

(b) A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

(c) The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a). Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is

assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

(d) No person is eligible to act as military judge in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or a counsel in the same case.

(e) The military judge of a court-martial may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court.

APPENDIX E

Manual for Courts-Martial, United States, 1984,
Rule for Courts-Martial 801

Rule 801. Military judge's responsibilities; other matters

(a) *Responsibilities of military judge.* The military judge is the presiding officer in a court-martial.

The military judge shall:

(1) Determine the time and uniform for each session of a court-martial;

(2) Ensure that the dignity and decorum of the proceedings are maintained;

(3) Subject to the code and this Manual, exercise reasonable control over the proceedings to promote the purpose of these rules and this Manual;

(4) Subject to subsection (e) of this rule, rule on all interlocutory questions and all questions of law raised during the court-martial; and

(5) Instruct the members on questions of law and procedure which may arise.

(b) *Rules of court; contempt.* The military judge may:

(1) Subject to R.C.M. 108, promulgate and enforce rules of court.

(2) Subject to R.C.M. 809, exercise contempt power.

(c) *Obtaining evidence.* The court-martial may act to obtain evidence in addition to that presented by the parties. The right of the members to have additional evidence obtained is subject to an interlocutory ruling by the military judge.

(d) *Uncharged offenses.* If during the trial there is evidence that the accused may be guilty of an untried offense

not alleged in any specification before the court-martial, the court-martial shall proceed with the trial of the offense charged.

(e) *Interlocutory questions and questions of law.* For purposes of this subsection "military judge" does not include the president of a special court-martial without a military judge.

(1) *Rulings by the military judge.*

(A) *Finality of rulings.* Any ruling by the military judge upon a question of law, including a motion for a finding of not guilty, or upon any interlocutory question is final.

(B) *Changing a ruling.* The military judge may change a ruling made by this or another military judge in the case except a previously granted motion for a finding of not guilty, at any time during the trial.

(C) *Article 39(a) sessions.* When required by this Manual or otherwise deemed appropriate by the military judge, interlocutory questions or questions of law shall be presented and decided at sessions held without members under R.C.M. 803.

(2) *Rulings by the president of a special court-martial without a military judge.*

(A) *Questions of law.* Any ruling by the president of a special court-martial without a military judge on any question of law other than a motion for a finding of not guilty is final.

(B) *Questions of fact.* Any ruling by the president of a special court-martial without a military judge on any interlocutory question of fact, including a factual issue of mental capacity of the accused, or on a motion for a finding of not guilty, is final unless objected to by a member.

(C) *Changing a ruling.* The president of a special court-martial without a military judge may change a ruling made by that or another president in the case except a previously granted motion for a finding of not guilty, at any time during the trial.

(D) Presence of members. Except as provided in R.C.M. 505 and 912, all members will be present at all sessions of a special court-martial without a military judge, including sessions at which questions of law or interlocutory questions are litigated. However, the president of a special court-martial without a military judge may examine an offered item of real or documentary evidence before ruling on its admissibility without exposing it to other members.

(3) *Procedures for rulings by the president of a special court-martial without a military judge which are subject to objection by a member.*

(A) Determination. The president of a special court-martial without a military judge shall determine whether a ruling is subject to objection.

(B) *Instructions.* When a ruling by the president of a special court-martial without a military judge is subject to objection, the president shall so advise the members and shall give such instructions on the issue as may be necessary to enable the members to understand the issue and the legal standards by which they will determine it if objection is made.

(C) *Voting.* When a member objects to a ruling by the president of a special court-martial without a military judge which is subject to objection, the court-martial shall be closed, and the members shall vote orally, beginning with the junior in rank, and the question shall be decided by a majority vote. A tie vote on a motion for a finding of not guilty is a determination against the accused. A tie vote on any other question is a determination in favor of the accused.

(D) *Consultation.* The president of a special court-martial without a military judge may close the court-martial and consult with other members before ruling on a matter, when such ruling is subject to the objection of any member.

(4) *Standard of proof.* Questions of fact in an interlocutory question shall be determined by a preponderance of the evidence, unless otherwise stated in this Manual. In the absence of a rule in this Manual assigning the burden of persuasion, the party making the motion or raising the objection shall bear the burden of persuasion.

(5) *Scope.* Subsection (e) of this rule applies to the disposition of questions of law and interlocutory questions arising during trial except the question whether a challenge should be sustained.

(f) *Rulings on record.* All sessions involving rulings or instructions made or given by the military judge or the president of a special court-martial without a military judge shall be made a part of the record. All rulings and instructions shall be made or given in open session in the presence of the parties and the members, except as otherwise may be determined in the discretion of the military judge. For purposes of this subsection [R.C.M. 801(f)] "military judge" does not include the president of a special court-martial without a military judge.

(g) *Effect of failure to raise defenses or objections.* Failure by a party to raise defenses or objections or to make requests or motions which must be made at the time set by this Manual or by the military judge under authority of this Manual, or prior to any extension thereof made by the military judge, shall constitute waiver thereof, but the military judge for good cause shown may grant relief from the waiver.

APPENDIX F

[SEAL] [SEAL]

THE DEPUTY SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301-1000

March 3, 1992

MEMORANDUM FOR:

SECRETARIES OF THE MILITARY DEPARTMENTS
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

SUBJECT: Ensuring Execution of the Laws and Effective Delivery of Legal Services

Among the chief duties of the Secretary of Defense and the Secretaries of the Military Departments is the faithful execution of the laws of the United States. Effective performance of that duty requires that the Department of Defense have a single chief legal officer and that each Military Department have a single chief legal officer. They should be responsible and accountable for proper, effective and uniform interpretation and application of the law and delivery of legal services. Section 139 of Title 10 of the United States Code provides that the General Counsel of the Department of Defense is the chief legal officer of the entire Department of Defense. As such, the General Counsel of the Department of Defense is responsible and accountable to the Secretary of Defense for and has the authority necessary to ensure uniform, proper interpretation and application of the law and delivery of legal services throughout the Department of Defense. The purpose of this memorandum is to provide similarly for a single chief legal officer for each of the Military Departments within the Department of Defense.

Accordingly, pursuant to Title 10, including Sections 113, 3011, 5011, and 8011, and Department of Defense Directive 5105.2, this is to direct effective immediately as follows:

(1) The General Counsels of the Military Departments shall be the chief legal officers of their respective departments, responsible to and subject to the authorities of the Secretaries of the Military Departments as the heads of the Military Departments and the General Counsel of the Department of Defense as the chief legal officer of the Department of Defense.

(2) The General Counsels of the Military Departments shall be responsible and accountable for proper, effective and uniform interpretation and application of the law and delivery of legal services within their respective departments.

(3) Civilian and military personnel performing legal duties with respect to organizations or functions under the jurisdiction of the Secretary of a Military Department shall be subject to the authority of the General Counsel of that Military Department with respect to the performance of those legal duties.

(4) The General Counsels of the Military Departments shall ensure that civilian and military personnel performing legal duties with respect to organizations or functions under the jurisdiction of the Secretaries of the Military Departments comply with applicable statutory, regulatory, and ethical standards of the legal profession in the performance of those duties.

(5) The legal opinions of the General Counsels of the Military Departments shall be the controlling legal opinions of their respective Departments.

(6) The General Counsels of the Military Departments, subject to the authority, direction and control of the

Secretaries of the Military Departments, shall implement this memorandum in a manner consistent with applicable law, including Sections 806, 825, 827, 854 through 870, 873, 874, and 945 of Title 10.

Nothing in this memorandum shall be deemed to create any right in any person not otherwise prescribed by law or regulation.

/s/ D.J. Atwood

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Supreme Court, U.S.
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No. 92-1022

In the Supreme Court of the United States

OCTOBER TERM, 1992

SCOTT J. CHATTIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, prohibits Congress from authorizing the Judge Advocate General to select commissioned officers in the military to serve as court-martial trial judges.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the Court of Military Appeals, Pet. App. 1a, is not yet reported. The opinion of the Navy-Marine Corps Court of Military Review, Pet. App. 2a-15a, is reported at 33 M.J. 802.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 14, 1992. The petition for a writ of certiorari was filed on December 14, 1992 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner pleaded guilty to one count of violating a lawful general order and two counts of violating the Federal Espionage Act, in violation of Articles 92 and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 892 and 934, and 18 U.S.C. 793(e) and 793(f).[1] The trial judge sentenced petitioner to confinement for four years, forfeiture of all pay and allowances, reduction to the lowest enlisted rank, and a bad-conduct discharge. On appeal, the Navy-Marine Corps Court of Military Review set aside one of the Federal Espionage Act convictions, but affirmed the remaining convictions and the sentence. The Court of Military Appeals exercised its discretionary jurisdiction to consider a challenge to petitioner's remaining espionage conviction. The Court of Military Appeals rejected petitioner's challenges to the conviction and summarily affirmed the judgment of the court of military review.

ARGUMENT

Petitioner maintains that the military trial judge was not qualified to hold that position because he was appointed to it by the Judge Advocate General of the Navy in violation of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. That claim does not warrant review by this Court, for several reasons.[2]

---

[1] Article 134 of the UCMJ, 10 U.S.C. 934, allows service members to be tried by courts-martial for violating any non-capital federal criminal statute.

[2] This Court has denied certiorari on that question twice this Term. *Allen* v. *United States*, cert. denied, 113 S. Ct. 324 (1992); *Williams* v. *United States*, cert. denied, 113 S. Ct. 379

First, petitioner has not properly preserved his claim for review by this Court. Petitioner did not raise this contention at or before trial and, therefore, has waived his claim under the rules of military procedure. Rule for Courts-Martial 905(e), *Manual for Courts-Martial, United States—1984*, at II-109.[3] Petitioner also did not raise this claim in the Navy-Marine Corps Court of Military Review or in the Court of Military Appeals, and neither court addressed petitioner's contention. Petitioner, therefore, cannot raise that claim for the first time in this Court. See, *e.g.*, *Taylor* v. *Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992) ("[O]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]."") (quoting *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976)); *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987).[4]

(1992); see also *Bolado* v. *United States*, cert. denied, 113 S. Ct. 321 (1992) (applying same principle to the selection of judges on the courts of military review). There is no reason to treat the petition in this case differently.

[3] Rule 905(e) provides as follows:

> Failure by a party to raise defenses or objections or to make requests which must be made before pleas are entered under subsection (b) of this rule shall constitute waiver. The military judge for good cause shown may grant relief from the waiver. Other requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is finally adjourned for that case and, unless otherwise provided in this Manual, failure to do so shall constitute waiver.

[4] The Court of Military Appeals did not grant review on this question. Accordingly, it is not clear that this question is

Relying on *Freytag* v. *Commissioner*, 111 S. Ct. 2631 (1991), petitioner asks this Court to forgive his waiver. *Freytag* involved an Appointments Clause challenge to the selection of special trial judges by the chief judge of the Tax Court, a challenge that the petitioners had not raised in that court. This Court said that it had the power to excuse the petitioners' waiver, and found *Freytag* to be "one of those rare cases in which we should exercise our discretion to hear petitioners' challenge" despite his failure to assert it in the courts below. 111 S. Ct. at 2639. Petitioner urges the Court to follow the same approach in this case.

Freytag, however, did not involve a rule of procedure, like Rule for Courts-Martial 905(e), requiring a defendant to raise a claim in a timely manner on pain of forfeiture. That difference is

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subject to review by certiorari in this Court. The statutes providing for certiorari review of the judgments of the Court of Military Appeals, 28 U.S.C. 1259(3) and 10 U.S.C. 867(h)(1), restrict this Court's certiorari jurisdiction to "[d]ecisions" of the Court of Military Appeals. Article 67(h)(1), UCMJ, 10 U.S.C. 867(h)(1), further provides that this Court may not review by certiorari "any action of the Court of Military Appeals in refusing to grant a petition for [grant of] review." The Court of Military Appeals has the statutory right to limit its decisions in any case to less than all the issues urged by the accused. See 10 U.S.C. 867(d). Since petitioner did not raise this issue for review by the Court of Military Appeals, there is a question whether that court rendered a "[d]ecision" on the issue that petitioner presents in his petition. For the reasons given in the text, however, it is unnecessary to answer that question in this case, since the question presented in the certiorari petition does not warrant review by this Court in any event.

material. For the past two decades, this Court has consistently declined to review defendants' claims that have not been properly preserved under the rules of trial and appellate procedure unless the defendant can establish both "cause" and "actual prejudice" for his default. See, *e.g.*, *Davis* v. *United States*, 411 U.S. 233 (1973); *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Murray* v. *Carrier*, 477 U.S. 478 (1986). Petitioner has made no effort to satisfy that test. In any event, petitioner has not explained why the question in this case is of such imperative public importance that this Court should deviate from its firmly settled practice of declining to serve as a nisi prius court.

Second, there is no conflict among the circuits on the question presented by the petition. The Court of Military Appeals and two courts of military review have rejected the claim raised by petitioner. *United States* v. *Weiss*, No. 67869/MC (C.M.A. Dec. 21, 1992); *United States* v. *Prive*, 35 M.J. 569 (C.G.C.M.R. 1992); *United States* v. *Coffman*, 35 M.J. 591 (N.-M.C.M.R. 1992). No federal appellate court has ruled to the contrary.

Third, petitioner's claim lacks merit. The question presented in this case is identical to the one presented in *Allen* v. *United States*, cert. denied, 113 S. Ct. 324 (1992) (No. 92-273). We rely upon our brief in opposition in that case.[5]

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[5] We have supplied petitioner's counsel with a copy of our brief in opposition in *Allen*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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